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No. 94-455

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In the Supreme Court of the United States

OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND
JOHN PAYNE, *Petitioners,*

v.

HOUSTON JONES, *Respondent.*

**On Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

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1. Respondent's central contention (at Br. 10-11) is that immunity may be asserted only when the defendant acted in the shadow of unsettled law, and that a defendant's simple denial of liability accordingly cannot implicate the qualified immunity doctrine. But that assertion is plainly wrong. While a defendant certainly may invoke immunity when he violated a constitutional right that was not clearly established at the time, he also may prevail "at an analytically earlier stage *of the inquiry into qualified immunity*" by showing that the plaintiff *altogether* failed to "state a claim for violation of

any rights secured to him under the United States Constitution." *Siegert* v. *Gilley*, 500 U.S. 226, 227 (1991) (emphasis added). The defendant therefore may assert qualified immunity when the plaintiff does not "assert[] a violation of a constitutional right *at all*." *Id.* at 232 (emphasis added).

Against this background, imagine that in this case the *undisputed* facts showed that petitioners used minimal force when taking respondent into custody. Imagine further that petitioners sought judgment on the pleadings on the ground that peacefully arresting a suspect does not violate the Constitution — and that the district court perversely denied the motion. There can be no doubt that, under *Siegert* and decisions like *Hunter* v. *Bryant*, 112 S. Ct. 534 (1991) (discussed at our opening brief at 15-16), petitioners would be entitled to an interlocutory appeal, even though there was no suggestion of legal uncertainty in the case. The reason is apparent: as we explain in our opening brief (at 9-12), the qualified immunity doctrine is designed to spare defendants the burden of defending against insubstantial suits. And a case in which the plaintiff entirely fails to state a claim is as insubstantial as they come.

It is no answer to this point to suggest that "the type of summary judgment order" in the case just hypothesized "is less plainly separate from the merits of the case than was the order in *Mitchell*[v. *Forsyth*, 472 U.S. 511 (1985)]." U.S. Br. 13. It is true that in *Mitchell* the defendant's claim was that, *whether or not* his actions violated the Constitution, the law governing those actions was not clearly settled at the time; that contention was related but not identical to the underlying merits. Similarly, in a case like *Anderson* v. *Creighton*, 483 U.S. 635 (1987), the defendant argues that, *whether or not* his conduct violated the Constitution, a reasonable officer in his position would have believed his actions to be lawful (see *id.* at 641); again, the overlap is substantial but the question is not identical to the merits. In

the case hypothesized above, in contrast, the defendants are sufficiently confident of their case that they omit the "whether or not" aspect of the argument, contending flatly that they did *not* violate the Constitution. For immunity purposes, however, the question is the same: whether the defendant's conduct violated clearly established law — an inquiry that, again, is not identical to the merits. That the court finds *no* violation in the course of answering that question can hardly destroy the right to appeal.

In fact, the distinction suggested by the decision below between cases in which the defendant denies violating the law *at all* and those in which he denies violating *clearly established* law is entirely semantic, for it will always be possible to state a defense like the one hypothesized above in terms that satisfy the court of appeals' requirement. The defendants in the hypothesized case could maintain, for example, that there was some uncertainty in the law of excessive force and that their conduct (wrestling a resisting suspect to the ground to subdue him) — whether or not actually violative of the Constitution — was not clearly illegal. See U.S. Br. 20. Or, stating their contention in terms that evoke *Anderson*, they could assert that, whether or not their conduct violated the law, reasonable officers in their position would not have believed the degree of force used to be excessive. This being so, denying such defendants a right to appeal because it turns out (as in *Siegert*) that they did not violate the law at all would have the perverse result of giving greater protection to officials whose actions might have violated the Constitution than to those whose conduct plainly did not.

2. It likewise is clear, as respondent acknowledges (at Br. 14), that both the district courts and the courts of appeals must resolve factual issues on the way to addressing immunity claims. The Seventh Circuit itself recognizes that "[i]t is impossible to know which 'clearly established' rules of law to consult unless you know what is going on." *Elliott* v.

Thomas, 937 F.2d 338, 342 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992). Thus, for example, imagine that a plaintiff claims the defendant police officers conducted an improper search because they broke into his house for no reason at all; the defendants respond that exigent circumstances supported the search because they saw a fugitive enter the house. Cf. *Anderson*, 483 U.S. at 637, 641. The district court (applying the proper summary judgment standard under Fed. R. Civ. P. 56) will have to decide which version of facts to assume as true "before [the defendants'] motion for summary judgment on qualified immunity grounds can be resolved." *Anderson*, 483 U.S. at 647 n.6. And if the district court rules for the plaintiff, there is no reason to doubt that the defendant is entitled to an interlocutory appeal in which "the court of appeals may consult the full record." *Elliott*, 937 F.2d at 342.[1] If the

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[1] In reaching the contrary conclusion in *Unwin* v. *Campbell*, 836 F.2d 124, 140 (1st Cir. 1988) (Breyer, J., dissenting), then-Judge Breyer relied principally on "practical considerations," including the concern that review of summary judgment records by the courts of appeals would prove unmanageable. But experience has not borne out this concern. As we note in our opening brief (at 8 n.3), six circuits now review the full summary judgment record in interlocutory immunity appeals; they have not experienced undo difficulty with case management. See page 7, *infra*. To the contrary, this Court recently expressed great skepticism about the suggestion that a distinction should be drawn between "cases in which the determination of * * * immunity is bound up with factual complexities * * * and cases in which it is not." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993). It also should be noted that then-Judge Breyer did not endorse the jurisdictional rule adopted by the court below; he "would not say that [the court of appeals] could *never* look at the record to establish the facts * * *. I would say only that we *ordinarily* should not go into questions of 'evidence sufficiency' on an interlocutory appeal, and that the defendant has no legal right to compel us to do so." *Unwin*, 863 F.2d at 140-141 (Breyer, J.,

court of appeals concludes that the district court erred and that there is no genuine issue of material fact regarding the defendant's version of the facts, the appellate court will proceed to address the immunity claim on that basis.[2]

3. With this established, neither respondent nor the court of appeals offers any reason for denying petitioners an appeal in the circumstances of this case. An appeal plainly would lie if there were no factual dispute here and petitioners simply presented the legal assertion that their conduct did not violate clearly established (or any) law. And we have just shown that the courts of appeals routinely resolve factual disputes of the kind in this case as a threshold matter in addressing such legal claims. It thus is unclear why the

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dissenting) (emphasis in original).

[2] Although the question is beside the point for present purposes, we note that respondent is incorrect in suggesting (at Br. 27-28) that petitioners' summary judgment motion was properly denied. In fact, respondent's opposition to the summary judgment motion hangs by the slenderest of evidentiary threads. Respondent recalled feeling pain when he was handcuffed and placed in a squad car, but he did not recall being beaten until after arriving at the police station, by which time petitioners' involvement with him had ended. Pet. App. 5a-6a. Such evidence is insufficient to defeat a summary judgment motion based on the petitioners' sworn testimony that no one struck, beat, or abused respondent at the scene of his arrest. "Even though all reasonable inferences are drawn in favor of the party opposing the motion, a scintilla of evidence in support of the nonmovant's position will not suffice to oppose a motion for summary judgement." *Tolle* v. *Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994). Respondent's argument rests on speculation, and "[s]peculation does not create a genuine issue of material fact; instead it creates a false issue, the demolition of which is a primary goal of summary judgment." *Hedberg* v. *Indiana Bell Telephone Co., Inc.*, 47 F.3d 928, ___ (7th Cir. 1995).

presence of a factual dispute that bears on the question whether the defendant violated established law should defeat the right to interlocutory appeal.

Certainly, that conclusion is not compelled by anything in either the principle of finality or the qualified immunity doctrine. The addition of a factual dispute does not create a greater overlap with the merits than is present when, as in *Siegert*, the issue is purely one of law; to the contrary, as we explain in our opening brief (at 20-21), the question here (whether there is a genuine issue of material fact) is at a considerably *greater* remove from the ultimate issue of whether the defendant violated the Constitution than was the inquiry in *Siegert*. And while it may be the case, as respondent (at Br. 19-20) and the United States (at Br. 14-15) observe, that the issue here is more "factual" than the one considered on appeal in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the interests protected by qualified immunity are likely to be *most* substantial in cases involving factual disputes. After all, as we also explain in our opening brief (at 30-31), the burdens of discovery and trial typically are greatest in such cases.

4. Respondent's only answer to this point is his repeated contention that petitioners' defense goes to the merits rather than to immunity. This argument, however, like the analysis used by the court of appeals, rests on an unduly crabbed understanding of qualified immunity. Respondent appears to believe that the only purpose of the doctrine is to protect officials from *ultimate liability* when they engage in conduct that is not understood to be clearly unconstitutional at the time but that is *in fact* illegal. But we explain in our opening brief (at 9-12), and the United States agrees (at Br. 15-16), that respondent's analysis is inconsistent both with the policy of the immunity doctrine and with the Court's articulation of that doctrine. The "driving force behind *Harlow*'s substantial reformulation of qualified-immunity principles" was "that 'insubstantial claims' against

government officials be resolved prior to discovery and on summary judgment if possible." *Anderson*, 483 U.S. at 640 n.2 (citation omitted). Qualified immunity therefore "protects 'all but the plainly incompetent or those who knowingly violate the law'" (*id.* at 638 (citation omitted)), a principle that necessarily applies to defendants who did not violate the law at all.

5. Respondent also is incorrect in contending (at Br. 18-19, 20-21, 23-25, 30) that our approach will lead to a multiplicity of burdensome and insubstantial interlocutory appeals. Experience proves that not to be the case. Five circuits (the First, Fourth, Eighth, Ninth, and Tenth) expressly permit such appeals now, and another (the District of Columbia Circuit) permits them in practice (see our opening brief at 8 n.3); these courts have not seen a flood of meritless appeals.[3]

Significant institutional considerations explain why this is so. Plaintiffs who prevail in § 1983 litigation generally receive their attorneys' fees; meritless appeals serve principally to increase those fees and therefore the defendant's ultimate liability — a powerful disincentive to appeal in such cases. Here, for example, two of the five defendants, recognizing that their situations arguably did present genuine issues of material fact, chose not to pursue interlocutory appeals. And insofar as the defendant's case is financed and managed by his governmental employer, as typically is the case in *Bivens* actions against federal employees, formal policies against frivolous appeals may impose an additional constraint.

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[3] We explain in the petition (at 16-17 & n.6) that the law is either inconsistent or unclear in four other circuits. The Seventh Circuit stands alone in holding unambiguously that it lacks jurisdiction to entertain an "I didn't do it" defense on interlocutory appeal.

Moreover, as the United States explains (at Br. 22-24), the courts of appeals themselves have powerful tools with which to discourage insubstantial appeals. "[A]ppellants or their counsel can be sanctioned for taking a frivolous appeal." *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 720 (10th Cir. 1988). District courts may certify qualified-immunity appeals as frivolous — an approach that already is available in the Seventh Circuit. *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). See U.S. Br. 22-23 (citing additional cases). And the courts of appeals may adopt their own summary procedures to "weed[] out" insubstantial interlocutory appeals. *Richardson* v. *United States*, 468 U.S. 317, 322 (1984). As the United States notes (at Br. 23 & n.13), several courts of appeals also have limited defendants to a single pre-trial immunity appeal; the Court recently granted certiorari to review the propriety of this approach. *Behrens* v. *Pelletier*, No. 94-1244 (cert. granted March 27, 1995).[4]

6. Finally, respondent offers no reply to the demonstration in our opening brief (at 25-31) and in the brief for the United States (at 19-20) that the court of appeals' approach is unmanageable. Respondent argues only (at Br. 29) that the Seventh Circuit's rule must be workable because that court did choose to entertain petitioners' appeal on the

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[4] Two additional points urged by respondent are insubstantial. While respondent maintains (at Br. 25) that courts of appeals have no experience in applying the summary judgment standard, those courts in fact apply that standard routinely in appeals from decisions *granting* summary judgment. And respondent is wrong in contending (at Br. 29) that the rule we propose will not limit discovery because all issues going to liability will have to be explored; in fact, discovery relating to a host of extraneous issues (such as damages, for example) may be precluded pending resolution of the immunity claim. Cf. *Anderson*, 483 U.S. at 647 n.6.

issue of probable cause to arrest. But as we explain in our opening brief (at 16), that aspect of the decision below actually highlights the inconsistencies inherent in the Seventh Circuit's rule because the defense to the false arrest claim, like the one the court declined to consider, involved no assertion of legal uncertainty. Application of the court of appeals' rule therefore would be sure to cause confusion and wasteful litigation as courts struggle to apply an approach that simply is not administrable.

For the foregoing reasons and the reasons stated in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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